COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Cambridge Electric Light Company	)	**D.T.E. 04-60**
Commonwealth Electric Company	)	
d/b/a NSTAR Electric	)	
	)	

MOTION OF THE ATTORNEY GENERAL TO STRIKE
PORTIONS OF THE INITIAL BRIEF OF PITTSFIELD GENERATING COMPANY

The Attorney General, pursuant to 220 C.M.R. §§ 1.04(5) and 1.11(7) and (8), moves that the Department of Telecommunications and Energy ("Department") strike portions of the initial brief ("Initial Brief") of Pittsfield Generating Company, L.P. (formerly known as Altresco Pittsfield, L.P.) ("Pittsfield") in this proceeding. As grounds for his Motion, the Attorney General states:

The Hearing Officer limited the scope of the proceedings:

> [t]he question of whether or not Altresco's current operation of the system, at the capacity factor at which you're currently operating the system, and the question of whether or not that's a breach, that's a legal question and that's not one we're going to determine here. In addition, the witnesses are not qualified to interpret the contract here. So I would not allow questions that interpret the contract, because they are not lawyers.

Tr. p. 194. Pittsfield's Initial Brief includes numerous arguments regarding the issues that the Hearing Officer explicitly excluded from consideration during this proceeding. For Pittsfield to now include these issues in its brief when the Department barred the Attorney General from exploring them during cross-examination is extremely prejudicial to the Attorney General.

Department precedent establishes that the proper procedure is to "strike extra-record evidence from a brief and require the offending party to file a conforming brief without reference

to the excluded evidence." *Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980). The Department has also used an alternative approach of "[striking] the offending portions from the brief and [disregarding] those portions of the brief in reaching a decision in the case." *AT&T Communications*, D.P.U. 91-79, p. 8 (1992), *citing Service Publications Inc. v. Goverman*, 396 Mass. 567, 580 (1986); *Hull Municipal Light Plant*, D.P.U. 87-19-A, p. 7 (1990); *Boston Edison Company*, D.P.U. 90-335, pp. 7-9 (1992).

The Department should strike the following portions of the Pittsfield's initial brief where it made claims outside of the allowed scope and without citation to the record:

- The second sentence of the last paragraph on page 9 interprets the parties' rights and obligations under the existing contacts:

  > First, the 1992 PSAs simply do not require the Project to achieve a higher capacity factor, and instead, require the Unit to be bid and operated in accordance with current market conditions and rules. Moreover, the Companies have no rights under the Existing PSAs to "require" Pittsfield to dispatch the unit in a certain way and any attempt by the Companies to cease payment or unilaterally terminate or amend the 1992 PSAs would constitute a material breach of the agreements subjecting the Companies to litigation and damages.

- In the next paragraph on page 10:

  > Second, if the Companies had chosen to litigate this issue rather than resolve it consistent with their mitigation obligation under the Restructuring Act, any such litigation would be met with resistance, would not succeed, and the time and costs incurred in pursuing such an endeavor would only serve to reduce customer savings.

- Also on page 10:

  > However, a plain reading of the unambiguous provisions of the 1992 PSAs reveals quite the opposite...

- The "NEPOOL Agreement" referred to on page 14, which is not in the record, and the entire discussion through page 15, first 4 lines, including footnote 5 at the bottom of page 14.

- Page 21, Section (5), second sentence:

> Yet, no contractual provision gives the Companies that right. Instead, as noted above, Section 4.1 of the 1992 PSAs provides that the Unit shall be subject to economic dispatch at the *sole direction* of NEPOOL...

- The attachment Pittsfield describes in the second paragraph on page 21, and in footnote 15, is not in the record and, in any event, since the existing contracts constitute the entire agreement between the Company and Pittsfield and supercede all of the previous agreements, discussions, communications and correspondence regarding the same subject matter of agreement (*see* NSTAR-CAM-GOL-1 and NSTAR-COM-GOL-1, section 17.1, p. 15), this purported characterization of the parties' intent is not embodied within the existing contracts:

> That the parties intended the Unit's dispatch to be controlled by NEPOOL and not the Companies is confirmed in an attachment to the 1992 PSAs that outlines the changes the parties made in the 1992 PSAs when compared to the Long-Run Standard Contract at the time. This attachment specifically states that Article 4 of the 1992 PSAs and, specifically, the provisions governing dispatchability of the Unit "have been modified to provide that NEPOOL, not the Company, will ordinarily control Unit dispatch."

- Footnote 15 on page 21:

> See February 20, 1992 PSAs filed with Department (and approved by the Department in a March 18, 1992 letter).

- In the fourth line, second paragraph, on page 22, Pittsfield again makes an unsupported interpretation of a breach under the existing PSAs and an argument outside the scope of this proceeding:

  > A unilateral cessation of payments under the 1992 PSAs by the Companies would constitute breach of those agreements and would subject the Companies to potential litigation and damages.

- For the same reason, the entire footnote 16 on page 22.

- Pittsfield's statements on page 26, third full paragraph, which it did not prove either by sponsoring a witness or through cross-examination of the Company's witnesses:

  > In Section V. A., above, as Pittsfield has demonstrated that it consistently has employed bidding and operating practices for the Unit which are strictly in conformance with the 1992 PSA's.

- The second sentence in the first full paragraph on page 27, where Pittsfield inappropriately discusses the interpretation of the PSAs in arbitration that does not exist and for which there is no evidence:

  > And, while again it would be impossible to predict the outcome of any arbitration, if the Companies indeed had pursued arbitration, it is highly likely that arbitrators would have sustained Pittsfield's interpretation of the 1992 PSAs. And, if any such decision by the arbitrators were followed by the execution of the termination agreements similar to those submitted in this case, the savings associated with those termination agreements would have been reduced significantly by the potentially high costs associated with pursuit of the failed arbitration.

For these reasons, the Department should grant this Motion To Strike the portions of Pittsfield's Initial Brief that lie outside the scope of these proceedings as clearly delineated by the Hearing

Officer.

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